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No. [redacted] 72

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

J. D. SHELLEY and ETHEL LEE SHELLEY, His Wife, and JOSEPHINE FITZGERALD,
Petitioners,

vs.

LOUIS W. KRAEMER and FERN E. KRAEMER, His Wife,
Respondents.

Petition for Certiorari to the Supreme Court of Missouri.

BRIEF OF THE ST. LOUIS CIVIL LIBERTIES COMMITTEE, AMICUS CURIAE.

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CITATION OF OPINION DELIVERED BELOW.

The opinion of the Supreme Court of Missouri delivered in this cause has not yet been officially reported, but is to be found as Kraemer v. Shelley, 198 S. W. (2d) 679.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under 28 USCA, sec. 344 (b), certiorari being sought on the ground that this is a cause wherein the final judgment and decree of the highest court of the State of Missouri deprived petitioners of a right, title, privilege, and immunity, namely, the right to own and occupy land in the City of St. Louis, which petitioners specially set up and claimed under the Fourteenth Amendment to the United States Constitution; under a treaty of the United States, namely, the United Nations Charter, Articles 55 and 56; and under statutes of the United States, namely, 8 USCA, sections 41 and 42.

STATEMENT OF THE CASE.

Respondents, plaintiffs below, are privy to a signator of a restrictive covenant entered into in 1911, by the terms of which Negroes are not permitted to occupy certain real property in the City of St. Louis. Petitioners and defendants below, the Shelleys, who are Negroes, purchased one of the pieces of property involved in the restrictive covenant from defendant Fitzgerald, whose title descended from persons privy to the covenant. Plaintiffs sought an injunction in the state courts of Missouri against defendants Shelleys' occupancy, and demanded that title be divested out of them.

The Circuit Court of St. Louis held the restrictions of the covenant invalid, but the Supreme Court of Missouri reversed. In so doing the Court found that the restrictions did not violate either the Missouri or Federal Constitutions, or the federal stautes enacted thereunder.

The principal questions presented here are, therefore, whether the action of the Missouri courts is state action within the purview of the Fourteenth Amendment, and whether it is prohibited by that Amendment and the statutes enacted thereunder.

INTEREST OF THE ST. LOUIS CIVIL LIBERTIES COMMITTEE.

The St. Louis Civil Liberties Committee is an organization the purposes of which are to defend the Bill of Rights and to secure for all persons equality of treatment before the law.

We are filing a brief amicus curiae in this case because the problem of racial discrimination is a most serious threat to American civil liberties. In the development

of a sound democracy it little matters that the discrimination exercised is overt or discreet. In either event, basic freedoms guaranteed by the Bill of Rights are undermined.

Restrictive covenants of the character here in issue may on their face appear to be merely private expressions of intolerance. If they were merely such, they would not concern us, however deplorable the sentiments might be. When, however, the state is requested to enforce them to the injury of a minority, the problem becomes public and intimately involves the purposes for which this organization was established.

ARGUMENT.

I.

Certiorari Should Be Granted Because the Supreme Court of Missouri Has Decided Federal Questions of Substance Not Heretofore Determined by This Court.

Although the Supreme Court of Missouri was apparently horrified by the restrictive covenant involved in this case, it felt that previous decisions required enforcement of the covenant. The Court said in part:

> "The chancellor found the negro population in St. Louis has greatly increased in recent years, and now numbers in excess of 100,000; and that some of the sections in which negroes live are overcrowded, which is detrimental to their moral and physical well being.
>
> "Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened, although much has been written and said on the subject from coast to coast" (198 S. W. [2] 679, 683) (Record, p. 159).

It would appear therefore that the Supreme Court of Missouri believes that restrictive covenants such as the one involved in the instant case are against public policy. A similar recognition that public policy requires that Negroes be allowed to expand out of and beyond the congested areas now allowed to them in American cities is clearly and cogently made by Mr. Justice Traynor, concurring in **Fairchild v. Rainer**, 24 Cal. (2) 818, 831-835, 151 P. (2) 260 (1944). His opinion is fortified by a reference to numerous sociological studies and documents,

official and private. The same view of public policy is to be found in the dissent of Mr. Justice Edgerton in **Mays v. Burgess**, 147 F. (2) 869, 874-878, 172 ALR 168 (CADC, 1945), and is there equally well buttressed by reference to social research.

A. The Supreme Court of Missouri has misinterpreted and misapplied the Federal cases.

In regard to the application of the Federal decisions and of the Federal guarantees of civil rights, the Missouri Court said:

> "The restriction does not contravene the guaranties of civil rights of the Constitution of the United States. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969. A recent case reviewing the Corrigan case and again upholding such an agreement is Mays v. Burgess, 147 F. (2d) 869, 172 ALR 168, decided by the United States Court of Appeals for the District of Columbia. That case considered the question whether a restrictive agreement violated the Fifth and Fourteenth Amendments and Section 1 of the Thirteenth Amendment of the Constitution of the United States and the statutes enacted thereunder, particularly 8 USCA, Secs. 41, 42, and held it did not. That case followed the ruling in Corrigan v. Buckley that neither the Thirteenth nor Fourteenth Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property. While Gandolfo v. Hartman (1892), 49 F. 181, takes a contrary view, we find it has been criticized and not followed, and so far as it relates to the question here has been overruled in effect by Corrigan v. Buckley. Nor can it be claimed that the enforcement of such a restriction by court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to state action exclusively. To sustain such a claim would be to deny the parties to such an agreement one of

> the fundamental privileges of citizenship, access to the courts. This would violate both the State and Federal Constitutions. Art. I, sec. 14, Constitution 1945; Art. IV, sec. 2, Constitution United States'' (198 S. W. [2d] 679, 683) (Record, p. 158).

Reference to Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926) shows that the case actually decided only that restrictive covenants in themselves are not unconstitutional and that the question of whether the courts below had deprived the defendants of their liberty and property without due process of law was not before the court. It is true that the decision states that the contention that the courts below had so deprived defendants is without merit; but this language is dictum on its face since the court previously stated that the issue was not before it. Moreover even the dictum is obviously not well considered, since the Fourteenth Amendment does not apply to the District of Columbia where the case arose. See **Wight v. Davidson**, 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900 (1900); **Neild v. District of Columbia**, 110 F. (2) 246 (CADC, 1940).

Thus while the question of whether the courts below deprived defendants of their property without due process of law or denied them the equal protection of the laws was not in the Corrigan case, it is specifically raised in the instant case (Record, pp. 11 and 12). Mr. Justice Rutledge while on the Court of Appeals for the District of Columbia, concurring in **Hundley v. Gorwitz**, 132 F. (2) 23, 25 (1942) recognized that the validity of restrictive covenants has not been settled.

Moreover it is to be noted that the Supreme Court of Missouri in the passage quoted above does not attempt to rely on **Corrigan v. Buckley**, supra, but instead concludes that it is obliged to enforce the covenants by the constitu-

tional guaranties, both Federal and State, that all persons shall have access to the courts. This amounts to a holding that the privilege of access to the courts carries with it the privilege of obtaining enforcement of contracts, the enforcement of which is forbidden by other constitutional guaranties. Needless to say, there is no opinion of this Court placing such a construction on Article IV, section 2, of the United States Constitution.[1] This clause, insofar as it refers to access to the courts, merely secures to citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state.

Missouri Pac. R. Co. v. Clarendon Boat Oar Co., 257 U. S. 533, 42 S. Ct. 210, 66 L. Ed. 354 (1922).

Contrary to the view of the Supreme Court of Missouri, it is well established that access to the courts does not mean that the Constitution requires judicial enforcement of contracts against public policy.

Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897).

And if Article I, section 14, of the Missouri Constitution of 1945,[2] is construed by the Supreme Court of Missouri to require the courts of Missouri to take action forbidden by the Fourteenth Amendment, then that provision, as so construed, must clearly be stricken as repugnant to the Federal Constitution.

U. S. C. A. Const., Article VI;
Testa v. Katt, 67 S. Ct. 810 (1947).

The Supreme Court of Missouri recognizes that the correction of the grave and acute problem presented in this

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1 "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

2 "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

case constitutes a challenge. That Court failed to meet the challenge. As enforced by the Missouri Supreme Court, these restrictive covenants become the instrumentalities of privately created but judicially enforced ghettos. This court should meet the challenge by granting certiorari. Refusal of this Court to grant certiorari would be tantamount to this Court's giving its imprimatur of approval to the ugly racism that nourishes on judicially enforced restrictive covenants.

II.

The Supreme Court of Missouri Has Failed to Recognize That the Action of a State Court in Enforcing a Restrictive Covenant by Injunction or any Other Means Is Indisputably State Action.

The Missouri court stated:

> "Nor can it be claimed that the enforcement of such a restriction by court process amounts to action by the State itself in violation of the 14th amendment, which relates to a State action exclusively." [198 S. W. (2d) 679, 683.] (Record, p. 158.)

The Missouri court failed to recognize that there is a difference between a refusal to sell property to a Negro and the intervention of the State at the behest of a third person, which intervention seeks to cancel the sale of land already made by a white man to a Negro. No restrictive covenant could be upheld in a contested case without the intervention of the State.

Moreover it is well established that the action of a State court is the action of the state.

Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897);
Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908).

The Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), while deciding that Congress had exceeded the power given it by the Fourteenth Amendment in enacting the Civil Rights Act of 1875 requiring all inkeepers, carriers, theatres, etc. to serve every applicant without discrimination, and thus deciding that the Fourteenth Amendment does not forbid any action on the part of individuals, nevertheless went on to make the express reservation (109 at p. 11) that the Fourteenth Amendment does nullify all **state action** of every kind which denies the equal protection of the laws.

As Professor D. O. McGovney has pointed out (33 Cal. L. Rev. 5, 21 [1945]):

> "The discriminatory agreements, conditions or covenants in deeds that exclude Negroes or other racial minorities from buying or occupying residential property so long as they remain purely private agreements are not unconstitutional. So long as they are voluntarily observed by the covenantors or the restricted grantees no action forbidden by the Constitution has occurred. But when the aid of the state is invoked to compel observance and the state acts to enforce observance, the state takes forbidden action. The deed to the colored buyer cannot be cancelled by purely private action. The Negro cannot be ousted from occupancy by purely private action. When a state court cancels the deeds or ousts the occupant, the state through one of its organs is aiding, abetting, enforcing the discrimination."

See also the recent study of this point, and the entire general question raised here by Professor Robert L. Hale, VI Lawyers Guild, Rev. 5, page 627 (1947).

III.

Enforcement by State Courts of Restrictive Covenants Has Been Held Unconstitutional by the Only Federal Court Which Has Squarely Considered the Question.

We have already pointed out that **Corrigan v. Buckley**, supra, relied on by the Supreme Court of Missouri does not deal with the Fourteenth Amendment at all, since the case arose in the District of Columbia. The same is true of **Mays v. Burgess**, supra, also cited by the Supreme Court of Missouri.

The only Federal case squarely on the question raised here is **Gandolfo v. Hartman**, 49 F. 181 (C. C., S. D. Cal., 1892), holding that "any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other" (page 182). This case has never been overruled. It could not have been overruled by **Corrigan v. Buckley**, supra, despite the opinion of the Supreme Court of Missouri in the instant case, because in the Corrigan case, the Court itself stated that the issue of the validity of State action was not before it.

IV.

This Court Has Repeatedly Ruled That Lower Court Decisions Can Be State Action in Violation of the Fourteenth Amendment.

The enforcement by a court of substantive rules of common law in such a way as to deprive persons of civil liberties guaranteed by the Bill of Rights has repeatedly been held by this court to be denial of due process of law under the Fourteenth Amendment.

Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941) (Reversing a conviction

for contempt of court by out-of-court publication.)

Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). (Reversing a conviction for disturbance of the peace by Jehovah's Witnesses' playing phonograph records on the streets.)

A. F. of L. v. Swing, 312 U. S. 321, 61 S. Ct. 735, 85 L. Ed. 1145 (1941). (Reversing an injunction against peaceful picketing granted on the ground that it was tortious.)

Bakery Drivers Local v. Wohl, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942). (Reversing an injunction against peaceful picketing granted on the ground that no labor dispute was involved as defined by state statutes.)

Likewise, the action of a court in denying the equal protection of the laws is state action forbidden by the Fourteenth Amendment.

Hysler v. Florida, 315 U. S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1941);

Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49, 48 L. Ed. 121 (1903).

As a specific example of the application of this principle, the Supreme Court has repeatedly declared the unconstitutionality of the trial of Negroes by juries from which Negroes have been systematically excluded.

Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839 (1900);

Rogers v. Alabama, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417 (1904);

Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 79 L. Ed. 1074 (1935).

V.

Since the Action Taken by the State of Missouri Through Its Courts Is Such as Would Be Forbidden by the Fourteenth Amendment if Done by a Legislative Body, It Follows That the State Action Involved Here Is Equally Repugnant to the Constitution.

It is clear, we submit, that the enforcement of a restrictive covenant by a State court is State action within the purview of the Fourteenth Amendment. The only remaining question then is whether or not it is such State action as is forbidden by the Constitution. A test of this question must be whether the same action if taken by a legislative body would be forbidden by the Fourteenth Amendment.

In **Buchanan v. Warley**, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), the Supreme Court held discrimination against Negroes in zoning ordinances to be violative of the Fourteenth Amendment. This case was instituted by a seller and it was held that he had been deprived of his right of alienation without due process of law. The opinion of the Court, however (245 at pp. 78 and 79), makes it abundantly clear that the Court would have reached the same decision had the case been instituted by a Negro purchaser claiming denial of equal protection of the laws with respect to his right to acquire, enjoy and use property.

Since it is the established law of the land that Negroes cannot be confined in their living area by act of the legislature, it follows that neither can they be so confined by act of a court. Indeed a system of restrictive covenants systematically employed to hold Negroes in run-down, over-populated areas accomplishes the same purposes as a zoning ordinance directed against them, with the single exception that when covenants are used the situation can-

not be corrected by a vote of the people. The public law element in restrictive covenants is quite apparent from the consideration that the so-called contract is enforced against the wishes of the owner of the present interest in the land.

VI.

Legally Enforced Segregation in the Field of Housing Is Necessarily a Denial of Equal Protection of the Laws.

Segregation as a rule for managing race relations is losing ground throughout the country. See **Morgan v. Commonwealth of Virginia**, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. Adv. Op. 982 (1946), and the Wartime Fair Employment Practices Committee. Segregation at its best works a corrupting effect on the community, since it rests on the assumption of superior and inferior races. The principle of segregation can only receive even partial justification when equal facilities are provided for both races concerned. Such a solution is obviously impossible in the matter of housing. Every piece of land is unique, and equal residential facilities are impossible.

Nor can restrictive covenants be properly enforced on the principle of reciprocity expressed to the effect that Negroes have an equal right to establish and enforce restrictive covenants barring white people from their areas. The allowance of such a theoretical right to exclude is no answer to a Negro family that cannot find a place to live. As Mr. Justice Cardozo said of another equalitarian provision of the Constitution (Article IV, section 2):

> "We are not to whittle it down by refinement of exception or by implication of a reciprocal advantage that is merely trivial or specious."

Smith v. Loughman, 245 N. Y. 486, 496, 157 N. E. 753, 757 (1927).

Furthermore, the immunity guaranteed by the equal protection clause of the Fourteenth Amendment is an individual one and may be claimed by an individual regardless of how the restrictive power complained of affects other individuals.

McCabe v. Atchison, Topeka and Santa Fe Ry. Co., 235 U. S. 151, 161, 162, 35 S. Ct. 69, 59 L. Ed. 169 (1914);

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351, 59 S. Ct. 232, 83 L. Ed. 208 (1938).

VII.

Enforcement of Restrictive Covenants Also Violates Federal Statutes, 8 U. S. C. A., Sections 41 and 42.

Congress enacted under the Thirteenth Amendment and re-enacted under the Fourteenth Amendment two statutes which now appear as 8 U. S. C. A., Sections 41 and 42, which provide as follows:

> "§ 41. Equal rights under the law.
>
> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

> "§ 42. Property rights of citizens.
>
> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

These statutes are not limited by their terms to guaranties against state action, but confer privileges to be held

free of encroachment from any source whatsoever. Conceding, however, that taking them as implementations of the Fourteenth Amendment, they can go no further than the Fourteenth Amendment and can thus only place limitations upon state action, still they stand as definite expressions of Congressional intent that the equal protection guaranteed by the Fourteenth Amendment shall extend to the acquisition of property by Negroes. These statutes thus make it abundantly clear that the enforcement by state courts of restrictive covenants is a denial of equal protection of the laws, which should be reversed by this Court.

Both these statutes were pleaded by defendants in their Answer (Record, pp. 10 and 11).

VIII.

This Court Has Never Determined the Validity of Restrictive Covenants in Light of the Numerous International Commitments of the United States.

Although not arising in the Courts of the United States, a particularly pertinent case is **Re Drummond Wren**, 4 D. L. R. 674 (1945). That case is especially illuminating because in it the Supreme Court of Ontario held a restrictive covenant invalid on the ground, among others, that international pacts such as the Act of Chapultepec entered into between the Latin American nations **and the United States** established a policy of non-discrimination.

The restrictive covenant involved in Re Drummond Wren was directed against Jews. In the instant case the covenant is directed against Negroes. The two types of covenants are equally repulsive and destructive of a free democratic society.

In that case Judge Mackay said:

> "My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate" (4 D. L. R., at p. 679).
>
> . . . . . .
>
> "The resolution against discrimination adopted unanimously by the Latin American nations and the United States in Mexico City on March 6, 1945, under the Act of Chapultepec, is that the governments of these nations 'prevent with all the means in their power all that may provoke discrimination among individuals because of racial and religious reasons'" (4 D. L. R., at p. 680).

The United States has also entered into another solemn pact against racial discrimination in the form of Articles 55 and 56 of the United Nations Charter, which pact was called to the attention of the Supreme Court of Missouri by defendants in their Motion for Rehearing (Record, pp. 166 and 167).

It is submitted that the decision of the Supreme Court of Missouri in the instant cases violates the terms of the international commitments of the United States, which, as treaties, are made part of the supreme law of the land by Article VI of the Constitution; constitutes a dangerous undermining of this Government; and causes other nations to question our good faith in entering into such commitments. This Court has never decided this question, but it should do so now.

IX.

Conclusion.

In conclusion, the St. Louis Civil Liberties Committee urges upon this Court that it grant certiorari to determine the validity of the enforcement of restrictive covenants by state courts, and that thereupon this Court hold that such enforcement is forbidden by the Fourteenth Amendment to the United States Constitution, the statutes enacted thereunder, and the United Nations Charter.

Respectfully submitted,

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